STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

GLOBALCOM, INC.	)	
	)	
vs.	)	
	)	
ILLINOIS BELL TELEPHONE COMPANY	)	**Docket No. 02-0365**
	)	
In the Matter of a Complaint Pursuant to 220 ILCS 5/13-515, 220 IL CS 5/10-101 and 10-108	)	

REPLY BRIEF OF AMERITECH ILLINOIS

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Illinois Bell Telephone Company ("Ameritech Illinois" or the "Company") hereby replies to the Initial Briefs submitted by Globalcom, Inc. ("Globalcom") and the Commission Staff ("Staff").

INTRODUCTION

For all the reasons discussed in Ameritech Illinois' Initial Brief, Globalcom has completely failed to meet its burden of proving that Ameritech Illinois has, in any way, acted unreasonably and with an intent to impede competition. As will be discussed herein, the arguments made by Globalcom in its Initial Brief are unsupported by the law and the record in this case. Accordingly, Globalcom's Complaint should be denied.

For its part, Staff has chosen to not address the validity of Globalcom's allegations and requests for relief. Instead, Staff has chosen to address the question of whether Illinois law requires the filing of a state tariff setting forth terms and conditions related to Ameritech Illinois' federal law obligations to allow conversions of special access services to UNE combinations. As will be discussed, this issue is beyond the scope of the proceeding and, in any event, is moot because the Company has had such a tariff in effect since September of 2001.

I. GLOBALCOM MISREPRESENTS THE "HISTORY" OF AMERITECH ILLINOIS' ALLEGED OBLIGATIONS TO PROVIDE NEW EELS

Globalcom continues to argue that Ameritech Illinois has had an obligation at all times since 1996 to perform the work of combining unbundled loop and dedicated transport facilities to create new EELs for the benefit of Globalcom. (Globalcom Init. Br., pp. 3-11, 31-33). Based on this legal assumption, Globalcom asserts that "in violation of this Commission's order in LDDS (contrary to the vacated but later reinstated FCC rules at 47 CFR 51.315(c)-(f)), Ameritech did not offer new EELs combined by Ameritech, pursuant to either tariff or interconnection agreement, at the time that Globalcom began its operations in November 1999." (Globalcom Init. Br., p. 49).

Globalcom fails to explain how Ameritech Illinois' alleged failure to offer new EELs "at the time Globalcom began its operations in November 1999" constitutes a violation of Section 13-514 for which damages can be awarded, or penalties imposed, under Section 13-516 of the Act. A complaint under Section 13-515 may not be filed unless the complainant has "first notified the respondent of the alleged violation and offered the respondent 48 hours to correct the situation." 220 ILCS 5/13-515(c). Globalcom did not notify Ameritech Illinois of an alleged violation of the Commission's Order in LDDS in November 1999 or at any subsequent time. The notice of alleged violation which preceded the filing of this Complaint was dated March 14, 2002, by which time Ameritech Illinois was already offering CLECs new UNE combinations through the Interim Compliance Tariff, which became effective on September 18, 2001.[1] Thus, there can be no lawful basis for a finding that Ameritech Illinois' alleged failure to offer

[1] In the March 14, 2002 Notice, Globalcom took issue with Ameritech Illinois' position that the transport elements of new EELs ordered under the Interim Compliance Tariff must terminate in a collocation arrangement. As will be discussed in Section II of this Reply Brief, Ameritech Illinois' alleged failure to provide new EELs without a collocation requirement prior to July 11, 2002, the effective date of the tariff complying with the final order in Docket 01-0614, does not constitute a violation of Section 13-514.

Globalcom with new EELs between November 1999 and December 2001, when Globalcom made its first request for new EELs, violates Section 13-514, or that such alleged failure should give rise to the award of damages and the imposition of penalties under Section 13-516.

Furthermore, Globalcom's argument that Ameritech Illinois had an obligation beginning in November 1999 to combine unbundled network elements on behalf of Globalcom disregards entirely the terms of its interconnection agreements with Ameritech Illinois, the first of which was entered into in October 1999. As Ameritech Illinois explained in its Initial Brief, Globalcom has acknowledged that Ameritech Illinois had no obligation under the terms of those contracts to provide "new EELs." (Tr. 155-57, 165; Am. Ill. Ex.1.0, p. 24). Globalcom's assertion that Ameritech Illinois acted unlawfully by not offering new EELs pursuant to an interconnection agreement (Globalcom Init. Br., p. 49) comes far too late in the game. If, as Globalcom had insisted, Ameritech Illinois has had an obligation to provide new UNE combinations since 1996, Globalcom could have sought to arbitrate the inclusion of such an obligation in its interconnection agreements. 47 USC, ¶ 252(a). Instead, Globalcom elected to adopt the terms of ICAs under which Ameritech Illinois had no obligation to provide new UNE combinations. Having freely entered into ICAs which place the responsibility of creating "new EELs" on itself, Globalcom may not now lawfully seek to unilaterally amend those ICAs to retroactively impose that responsibility on Ameritech Illinois.

In any event, for all the reasons discussed in Ameritech Illinois' Initial Brief (pp. 26-39), there is no basis for Globalcom's argument that the alleged failure of Ameritech Illinois to offer new EELs beginning in November 1999 violates the Commission's Order in 95-0458/0531 ("LDDS").[2] Globalcom erroneously asserts that the Commission in LDDS made an "expansive

[2] In its Initial Brief, Ameritech Illinois defined the order in Docket 95-0458/0531 as the "Wholesale Order." In this Reply Brief, Ameritech Illinois will use Globalcom's definition of the case as "LDDS."

directive" that Ameritech Illinois "file tariffs" for the provision of "any and all network elements to be made available, in the combination, including new EELs. (Globalcom Init. Br., p. 3). In reality, what the order in LDDS actually directed the Company to do was "file a tariff to implement the platform proposal of LDDS, as modified by the Commission Staff and set forth in the prefatory portion of this order." Order, Docket 95-0458/0531, p. 78 (June 26, 1996). As the Company pointed out in its Initial Brief, the "platform proposal" of LDDS, as described in the prefatory portion of the Order, was to make three particular network elements (loop, local call termination, and switch) "available in such a manner as to enable the requesting carrier to combine all three network elements to provide end-to-end telecommunications service." Order, Docket 95-0458/0531, at 56 (emphasis added). Staff's modification of the LDDS proposal was to identify the three components of the "platform" as the loop, local switch platform, and interoffice transport. Order, Docket 95-0458/0531, at 58. In support of its proposal, Staff asserted that Section 251(c)(3) of the 1996 Act "requires incumbent LECs, including and Centel, to provide the requesting carrier unbundled network elements that they may be able to combine in order to provide telecommunications service." Id. (emphasis added).

Thus, Globalcom's suggestion that the LDDS Order directed Ameritech Illinois to file tariffs for the provision of "new EELs" (which is a combination of loop and dedicated transport that does not include a local switch) is simply wrong. Indeed, the Order in LDDS did not direct Ameritech Illinois to file a tariff for the provision of "new combinations" of any type. What is obvious from the plain language of the LDDS Order was also obvious to the Commission two years later in Docket 96-0503, where it expressly stated that the LDDS Order was a "decision that required unbundling by the LATA and allowed rebundling by the competing carrier" and

"did not require provision of LEC combinations priced upon the cost of the underlying network elements." Order, Docket 96-0505, 1998 Ill. PUC Lexis 390 at *20 (May 19, 1998).

Globalcom acknowledges that the FCC's rules adopted in the First Report and Order, requiring ILECs to combine UNEs in certain circumstances, were vacated by the United States Court of Appeals for the Eighth Circuit on July 18, 1997. Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Circuit 1997) ("IUB I"). Globalcom, however, asserts that while the FCC's rules regarding new combinations were vacated, "this Commission continued to assert its authority to interpret the Federal Act to require such combinations" in Docket 96-0458/96-0569 (February 17, 1998) (the "TELRIC Order"). Once again, the facts prove otherwise. As a threshold matter, there is absolutely no language in the TELRIC Order about a new combinations requirement. To the contrary, when the TELRIC Order (p. 125) discussed "end-to-end bundling," it expressly relied on the Eighth Circuit's discussion of end-to-end bundling in IUB I. In that case, of course, the Eighth Circuit (like the LDDS Order) discussed the "end-to-end bundling" issue only in the context of whether an ILEC had to provide enough UNEs so that a CLEC could, if it combined the UNEs itself, provide an "end-to-end" service. See IUB I, 120 F.3d at 814-15; see also, AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 392 (1999) ("IUB II") (discussing same issue with respect to end-to-end bundling). This was treated as a separate issue from whether an ILEC could have any duty to combine UNEs. See IUB I, 120 F.3d at 813. Given the TELRIC Order's reliance on the "end-to-end bundling" discussion in IUB I, there is no way to read it as requiring ILECs to combine UNEs.

Furthermore, the Commission issued its Order in Docket 96-0503, which held that GTE did not have to combine UNEs for CLECs, a few months after issuing the TELRIC Order. As discussed, the Commission in Docket 96-0503 interpreted the LDDS Order as not having

required Ameritech Illinois or Centel to combine UNEs for CLECs. Furthermore, constitutional principles of equal protection and non-arbitrary regulation would have prohibited the Commission from applying different unbundling rules to GTE and Ameritech Illinois, meaning that if GTE was not required to combine UNEs, then Ameritech Illinois could not have been required to do so, either. This confirms that the Commission did not require Ameritech Illinois to combine UNEs in the TELRIC Order.

Globalcom's attempt to dismiss the order in Docket 96-0503 as an "anomaly that should not have any weight in this proceeding" because it was a "GTE case not an Ameritech case" is impossible to comprehend. While it is true that Docket 96-0503 was a case involving GTE, the Order in that case interpreted the LDDS Order which did involve Ameritech Illinois, and found that the LDDS Order did not require Ameritech Illinois to provide new combinations. The Order in 96-0503 is, therefore, clearly relevant to the issue of whether Ameritech Illinois reasonably relied upon the Eighth Circuit's decision to vacate the FCC's new combination rules in maintaining the position that it was not required to provide new combinations during the period of time during which those rules were vacated. The reasonableness of the Company's reliance on the Eighth Circuit's decision is also supported by the March 14, 2001 Order in Docket 00-0393, where the Commission stated that "under the Eighth Circuit's decision in IUB I and IUB III, Ameritech Illinois cannot be required to provide new combinations of network elements." Order, Docket 00-0393, p. 52 (March 14, 2001).[3]

[3]The reasonableness of the Company's position is also confirmed by the recent order in 99-0511, in which the Commission, based on the Eighth Circuit's decision vacating the FCC's new combination rules, declined to adopt a rule requiring all Illinois ILECs to "combine, upon request, any sequence of UNEs that it ordinarily combines for itself." Order, Docket 99-0511, p. 131 (March 27, 2002). The Order in Docket 99-0511 recognizes that, but for Section 13-801(d)(3) (applicable only to Ameritech Illinois), there was, prior to the Supreme Court's May 13, 2002 decision in Verizon Communications, no requirement that ILECs combine UNEs on behalf of CLECs.

Globalcom relies upon the Commission's decision in Docket 98-0396 (the "TELRIC Compliance Order"), in which the Commission adopted a requirement that Ameritech Illinois provide to CLECs combinations of unbundled network elements that Ameritech Illinois ordinarily combines for its own use or for its end use customers. Order, Docket 98-0396, p. 95 (October 16, 2001). This Order, however, was issued after Ameritech Illinois had already filed its Interim Compliance Tariff offering new UNE-P and EEL combinations in accordance with Section 13-801(d)(3), a statutory provision relied on, in part, by the Commission in its TELRIC Compliance Order. Contrary to Globalcom's suggestion, the TELRIC Compliance Order did not hold that Ameritech Illinois had already been ordered to provide new UNE combinations, including EELs. Rather, the Order held that the Commission "has legal authority" to order Ameritech Illinois to provide new UNE combinations and directed Ameritech Illinois to file a combination tariff consistent with the Order's findings to be effective on a prospective basis. Accordingly, there is no lawful basis for adopting Globalcom's proposal to punish Ameritech Illinois for failing to comply with the requirements of the TELRIC Compliance Order beginning in November 1999, two years before that Order was issued.[4]

II. AMERITECH ILLINOIS' ENFORCEMENT OF ITS TARIFFED COLLOCATION REQUIREMENT DID NOT VIOLATE SECTION 13-514

The issue raised by Globalcom's Complaint is this: did Ameritech Illinois commit a per se violation of Section 13-514 when it declined to grant Globalcom's request for a waiver of the Interim Compliance Tariff's collocation requirement for new EELs? The Commission must

[4] Globalcom makes a number of extraneous and erroneous assertions regarding the findings of the TELRIC Compliance Order and the Order in Docket 01-0614, none of which have anything to do with the issues in this case. For example, Globalcom (i) cites a finding in the TELRIC Compliance Order criticizing an aspect of the Company's UNE cost of service study which had nothing to do with the "combinations issue" (Globalcom Init. Br., p. 8); (ii) improperly cites the TELRIC Compliance Order on Reopening's summary of an argument made by the Commission Staff as if that argument constituted a finding of the Commission (Globalcom Init. Br., pp. 8-9); and (iii) asserts that the Commission's Order in 01-0614 "found that once again, Ameritech had failed to provide evidence responding to the directive in the TELRIC case" when, in fact, no such finding appears in the Order in Docket 01-0614.

answer this question in the negative. Under the filed rate doctrine, Ameritech Illinois was not permitted to deviate from the collocation requirement of its Interim Compliance Tariff for any reason. AT&T v. Central Office Telephone, 524 U.S. 214, 222 (1998). Thus, as this Commission has recognized, a telecommunications carrier's enforcement of the terms and conditions of its effective tariffs cannot constitute grounds for a complaint under Sections 13-514 and 13-515 of the Act: "[C]hanges to the terms and conditions of the tariff can be reviewed only in the context of a Section 9-201 or 9-250 proceeding. There is no language in Section 13-514 or Section 13-515 of the Act indicating that the sections were to replace the established procedural mechanisms for reviewing, approving and, if necessary, ordering changes to a carrier's tariff." Rhythms Links, Inc., Docket 99-0465, p. 13 (Dec. 2, 1999) (rejecting a complaint alleging the provisions of an Ameritech Illinois amended collocation tariff were anticompetitive).

At the time that Globalcom filed its Amended Complaint, the reasonableness of Ameritech Illinois' tariff requirement that new EELs terminate in a collocation arrangement was already being addressed in Docket 01-0614, a tariff proceeding initiated pursuant to Section 9-201 of the Act. A final Order in that docket, dated June 11, 2002, was issued less than a month after Globalcom filed its Complaint. In the Order, the Commission concluded that there should be no collocation requirement (independent of the collocation requirements applicable under two of the three local use tests) for the provision of new EELs. Order, Docket 01-0614, p. 77 (June 11, 2002). Ameritech Illinois has filed tariff revisions to comply with the Order. Accordingly, Globalcom has already received all of the "relief" to which it is entitled with respect to its arguments regarding the collocation requirement for new EELs.

Globalcom continues to argue that Ameritech Illinois acted in "bad faith" by defining a new EEL for purposes of the Interim Compliance Tariff as a combination of unbundled local

loop and unbundled dedicated transport, with the transport terminating in a CLEC's collocation arrangement. Globalcom suggests that the Company's decision to define new EELs in this manner was done with the specific intent of throwing up "roadblocks" to Globalcom's ability to provide service. (Globalcom Init. Br., pp. 2, 10, 27-29). Globalcom's assertions are nonsense. There is absolutely no basis for the suggestion that Ameritech Illinois defined new EELs in a way that was intended to impede Globalcom's ability to compete. Indeed, prior to December 2001, Ameritech Illinois was not even aware of Globalcom's desire to obtain new EELs.

The unrebutted evidence shows that the Company's intent in preparing and filing the Interim Compliance Tariff was part of a good faith effort to provide CLECs with an opportunity to take immediate advantage of the new offerings mandated by Section 13-801 and, in particular, the combinations of unbundled network elements specified in Section 13-801(d)(3). (Am. Ill. Ex. 4.0, pp. 8-11; Am. Ill. Ex. 4.1, pp. 2-4). Ameritech Illinois initially filed proposed tariff amendments on July 2, 2001 and advised the Commission that it would be willing to put the tariff amendments into effect on less than 45 days notice during the pendency of a tariff investigation. The Commission, however, did not accept the Company's suggestion and ultimately suspended operation of the proposed tariff amendments pending the completion of Docket 01-0614. (Id.).

Undaunted, Ameritech Illinois developed an Interim Compliance Tariff and requested that it become effective on less than 45 days notice so that CLECs could at least have the opportunity of taking advantage of the new UNE combinations identified in the Draft I2A (which was incorporated by reference in Section 13-801(d)(3)) pending the completion of Docket 01-0614. The Commission reviewed the Interim Compliance Tariff and allowed it to go into effect upon a finding of good cause on September 18, 2001 in Docket 01-0586. But for Ameritech

Illinois' initiative in seeking approval of an Interim Compliance Tariff, the new UNE-P and EEL combinations included therein would not have been available through a tariff until July 12, 2002, when the tariff filed to comply with the final Order in Docket 01-0614 became effective.

As the Company discussed in its Initial Brief (pp. 51-52), Globalcom's interconnection agreement does not require Ameritech Illinois to provide new EELs to Globalcom under any circumstances, with or without a collocation requirement. Thus, the only reason that Globalcom would have been permitted to obtain new EELs in December of 2001 (when it first made a request for new EELs) is that Ameritech Illinois took the initiative to file an Interim Compliance Tariff and included in that tariff language stating that CLECs with an effective ICA "shall be permitted to subscribe to the provisions under this tariff." Ill.C.C. No. 20, Part 19, Section 22, Original Sheet No.1. But for this provision, Globalcom would have had no right to request that Ameritech Illinois perform the work of combining UNEs to create new EELs even if it were collocated.

In sum, Ameritech Illinois' efforts to make the UNE-P and EEL combinations listed in the Draft I2A available to CLECs on an immediate basis through the implementation of an Interim Compliance Tariff pending the completion of Docket 01-0614 represented an effort to enhance, not impede, competition. There is no basis for a finding that Ameritech Illinois violated Section 13-514 by voluntarily making available to Globalcom a tariff product (new EELs), subject to a collocation requirement, that Globalcom would have no right to request under the terms of its binding interconnection agreement and which would not otherwise have been available to Globalcom, or any other CLEC, through a tariff prior to the completion of Docket 01-0614.

For all the reasons already fully discussed in Ameritech Illinois' Initial Brief (pp. 46-52), the manner in which Ameritech Illinois defined a new EEL for purposes of its Interim Compliance Tariff and proposed permanent compliance tariff was based on a reasonable, good faith interpretation of Section 13-801. In support of its assertion that Ameritech Illinois acted in "bad faith" with respect to its drafting of the Interim Compliance Tariff, Globalcom relies upon the fact that the Order in 01-0614 required Ameritech Illinois to remove the collocation requirement for new EELs. (Globalcom Init. Br., p. 10). The fact that the Commission ultimately disagreed with an aspect of Ameritech Illinois' interpretation of Section 13-801 does not support a decision, based on "20-20 hindsight," that Ameritech Illinois acted in "bad faith" when it filed the Interim Compliance Tariff nine months prior to the issuance of the Order in 01-0614.

Globalcom also relies on the FCC's decision in Net2000 Communications, Inc. v. Verizon et al., FCC 01-381. That decision is clearly inapposite. Net2000 did not involve a request for new EELs. Rather, the issue in Net2000 was whether collocation is a requirement for the conversion of existing special access circuits to an existing combination of UNEs under all three of the FCC's local use tests. The FCC concluded that, under one of its three local use tests, collocation is not a requirement. As the Company discussed in its Initial Brief, Ameritech Illinois has never taken the position that collocation is a requirement for conversion under all three of the FCC's local use tests.

Furthermore, Globalcom's discussion of Net2000 ignores the fact, in its UNE Remand Order (cited in Net2000), the FCC expressly declined to require ILECs to provide new EELs under any circumstances, with or without a collocation requirement, stating that "we neither define nor interpret Section 51-315(b) as requiring incumbents to combine unbundled

network elements that are ordinarily combined." UNE Remand Order, ¶ 480. Furthermore, the decision in Net2000 was issued on January 9, 2002, four months after the Interim Compliance Tariff became effective. Accordingly, even if Net2000 did stand for the proposition that the inclusion of a collocation requirement for the provision of new EELs is improper (and it does not), that fact would not support a conclusion that Ameritech Illinois acted in "bad faith" by including a collocation requirement in its Interim Compliance Tariff.

III. GLOBALCOM'S ARGUMENTS REGARDING ALLEGED UNLAWFUL EEL RESTRICTIONS, OTHER THAN THE COLLOCATION REQUIREMENT, ARE OUTSIDE THE SCOPE OF THIS COMPLAINT PROCEEDING AND SHOULD BE DISREGARDED

In addition to its arguments regarding the legality of the collocation requirement included in Ameritech Illinois's Interim Compliance Tariff, Globalcom asserts that Ameritech Illinois unlawfully imposed certain other "restrictive limitations" on the availability of new EELs, including the limitation of new EELs to "circuit switched voice or packet switched application." (Globalcom Init. Br., pp. 24-26). This argument is simply a restatement of the allegation in its Complaint that Ameritech Illinois violated Section 13-514(10) by "refusing to provide Globalcom with new EELs unless . . . Globalcom transmits primarily voice traffic over the circuits." (Amended Complaint, p. 22). The ALJ dismissed this aspect of Globalcom's Amended Complaint on the grounds that Globalcom had failed to provide Ameritech Illinois with notice of and an opportunity to correct the alleged violation.[5]

Globalcom also takes issue with what it refers to as "restrictive limitations to the 'flavors' of Ameritech's policy planner sought to provide." (Globalcom Init. Br., pp. 24-26). The term "flavors" of EEL combinations, as used by Ameritech Illinois witnesses Beata and Wardin,

[5] It should be noted that the EELs tariff filed by Ameritech Illinois on July 11, 2002 in compliance with the Final Order in Docket 01-0614 removed the limitation regarding circuit switched voice or packet switched applications. (Am. Ill. Ex. 9.0).

refers to eight specific loop transport combinations referred to in the Draft I2A (incorporated by reference in Section 13-801(d)(3)) and included in both Ameritech Illinois' Interim Compliance Tariff and the permanent compliance tariff filed on July 11, 2002. Globalcom did not allege, either in its March 14, 2002 Notice or in its Complaint, that the failure to list EEL combinations other than the eight combinations included in the Interim Compliance Tariff constitutes a violation of Section 13-514. Accordingly, Globalcom's complaints regarding the available "flavors" of EELs should be disregarded.

Furthermore, the Commission in Docket 01-0614 approved the proposed list of eight specific new EELs and twelve specific new UNE-P combinations proposed by Ameritech Illinois. Ameritech Illinois also proposed a process, known as the Bona Fide Request – Ordinary Combinations ("BFR-OC"), for use by CLECs in requesting new UNE combinations that are not on the list of twelve UNE-P and eight EEL combinations. The Commission approved the Company's proposed BFR-OC process with certain modifications. In approving the BFR-OC process stated that:

> We note that the legislature has set out, with specificity, the minimum "ordinarily combined" combinations that Ameritech must make available to requesting carriers and that Ameritech has dutifully included the minimums in its tariffs. Furthermore, none of the parties have indicated, with any specificity, any additional combinations that they believe should be included at this time.

Order, Docket 01-0614, ¶ 496 (emphasis added). (Am. Ill. Ex.4.1, pp. 11-12). Thus, the Commission has approved the list of eight EEL combinations proposed by the Company (and included in the Interim Compliance Tariff) and did not require Ameritech Illinois to include any additional combinations on the list. Accordingly, Globalcom's bald assertion that Ameritech Illinois failed to act in "good faith" by including in its tariff a list of EELs that is too "narrow" is without merit.

IV. GLOBALCOM'S ALLEGATIONS REGARDING THE ALLEGED DIFFICULTY OF CONVERTING SPECIAL ACCESS CIRCUITS TO UNES ARE MISLEADING

As discussed in Ameritech Illinois' Initial Brief (pp. 39-44), the allegation in Globalcom's Amended Complaint (¶¶ 56, 57) that Ameritech Illinois refused to "allow" conversions of special access circuits to combinations of UNEs prior to September 2001 is unsupported by any evidence. In its Initial Brief, Globalcom does not attempt to support this allegation. Rather, Globalcom asserts that conversion from special access to EELs was "not a realistic option for Globalcom." (Globalcom Init. Br., p. 19). Globalcom further asserts that "whether Globalcom could have converted prior to December 27, 2001 is irrelevant in this proceeding." (Id., p. 22). Accordingly, the purpose of Globalcom's discussion of whether conversion from special access to EELs was a "realistic option" is unclear and it should be disregarded.

In any event, Globalcom's discussion is misleading in several respects. First, Globalcom alleges that "Ameritech initially refused to offer conversions to CLECs unless they had an interconnection agreement ("ICA") with Ameritech." (Globalcom Init. Br., p. 20). In fact, the evidence cited by Globalcom indicates that when SBC initially implemented the process for converting special access circuits to UNE combinations pursuant to the UNE Remand Order and Supplemental Order in early 2000, there was no requirement for an interconnection agreement. (Tr. 425). The internal policy cited by Globalcom referring to the need for an interconnection agreement or amendment was adopted in March 2001. (Tr. 425-26). In any event, the unrebutted evidence also shows that, in early 2000, SBC created a form contract amendment governing special access conversions for easy insertion into CLEC customers' existing interconnection agreements for those carriers who elected to amend their agreements. (Am. Ill.

Ex. 2.0, p. 5). By that time, Globalcom had entered into an ICA with Ameritech Illinois. There is no basis for Globalcom's suggestion that it would have had any difficulty amending its ICA to included language related to special access to UNE conversions. Ultimately, Globalcom elected to opt into the Focal Agreement, which already contained provisions governing special access conversions.

Second, Globalcom continues to assert that the initial "two step" conversion process was "unduly burdensome to both CLEC and customer." (Globalcom Init. Br., p. 20). As discussed by the Company in its Initial Brief (pp. 42-44), there is no evidence in the record to support this assertion. To the contrary, the evidence shows that the "two step process" was designed to be implemented in a way that would not require a physical disconnection of the special access circuit and that the FCC has expressly concluded that multi-step ordering processes such as that originally implemented by Ameritech Illinois are acceptable and consistent with FCC rules. (Am. Ill. Ex. 2.0, pp. 20-21; Tr. 460-61). This evidence was unrebutted.

Third, Globalcom complains about the nonrecurring charges that have applied to conversion of special access to EELs. Globalcom ignores the fact that its interconnection agreement specifies the charges applicable to conversions. Furthermore, Globalcom failed to present any evidence to suggest that the nonrecurring charges applicable to special access to UNE conversions have had any adverse impact on Globalcom or any other CLEC.

Fourth, Globalcom asserts that "during the period that CLEC is attempting to convert circuits to EELs, it must continue to pay month-to-month special access rates." (Globalcom Init. Br., p. 23). Globalcom alleges that "for all but the shortest lines, the monthly recurring charges for special access circuits are higher than the monthly recurring charges for Ameritech's comparable end user-ISDN service," resulting in a "price squeeze." In support of this assertion,

Globalcom relies on an exhibit sponsored by Mr. Wince which purports to show that "Globalcom would pay Ameritech a monthly fee of $1,013.40 to serve a customer in Barrington" while "Ameritech could offer that same customer ISDN service under a monthly contract for only $849.19." (Globalcom Init. Br., p. 23; Globalcom Ex. 5.1).

Globalcom's "analysis" ignores the fact that, as shown on Globalcom Exhibit 5.1, Ameritech Illinois' nonrecurring charge for ISDN service sold to retail end user customers is approximately three times the nonrecurring charge that Ameritech Illinois would assess to Globalcom for the special access circuit. Taking into account this difference in nonrecurring charges, the total amount that Globalcom would pay to Ameritech Illinois on a month-to-month basis would not exceed the total amount charged by Ameritech Illinois for ISDN service on a month-to-month basis until the eighth month. There is absolutely no evidence that it would take eight months to accomplish a conversion of special access circuit to UNE combination, assuming that Globalcom otherwise qualified for that conversion under the FCC local use test.

Furthermore, Globalcom's entire analysis is based upon the assumption that it would serve only one customer in Barrington with a single DS1 circuit. If Globalcom were to purchase a DS3 circuit (which is the equivalent of 28 DS1 circuits) in order to serve a number of customers in Barrington, the monthly special access rates paid by Globalcom on a per-customer basis would be substantially less than the DS1 monthly recurring charge of $1,013.40 used by Mr. Wince in his analysis.

Finally, the monthly special access cost for a special access circuit to Barrington, as shown in Exhibit 5.1, is a factor of the distance between Globalcom's switch and the customer. Thus, the costs incurred by Globalcom with respect to special access services are in large part attributable to the decisions made by Globalcom with respect to the configuration of its network

system. The mere fact that Globalcom is able to identify one hypothetical example in which the monthly recurring cost of a special access service would exceed the monthly recurring price for ISDN service does not prove that "Ameritech's special access service rates are structured so that month-to-month service is generally more expensive than the month-to-month rates of ISDN service." (Globalcom Init. Br., p. 46). Indeed, that allegation is directly refuted by Globalcom Exhibit 5.1, which shows that the month-to-month DS1 special access costs that Globalcom would incur to serve a customer in Chicago is significantly less than the monthly fee that Ameritech Illinois would charge for ISDN service. (Globalcom Ex. 5.1).[6]

V. GLOBALCOM'S ALLEGATIONS THAT AMERITECH ILLINOIS HAS EXHIBITED A "LACK OF CANDOR OR MALFEASANCE" IS UNFOUNDED AND BASED UPON MISCHARACTERIZATIONS OF THE RECORD

In an attempt to distract attention from the real issues in this case, Globalcom (Init. Br., pp. 13-15) discusses two examples of what it characterizes as "Ameritech's lack of candor or malfeasance." As discussed below, Globalcom's allegations mischaracterize the record and are themselves examples of a "lack of candor."

A. AMERITECH ILLINOIS ASSISTED GLOBALCOM IN IDENTIFYING AND EMPLOYING AVAILABLE, COST EFFECTIVE SERVICE ALTERNATIVES

As its first alleged example, Globalcom asserts that "Mr. Wince asked on numerous occasions for a low priced product and was repeatedly put off by the account team representatives, employed, we are told, to service wholesale customers like Globalcom." (Globalcom Init. Br., p. 13). This allegation is a gross mischaracterization of the record. Indeed, Globalcom fails to even include within its Brief a citation to the testimony in which Mr. Wince supposedly made this allegation. In fact, Mr. Wince's own testimony demonstrates that Ameritech Illinois assisted Globalcom in designing a cost effective network, identifying

[6] Moreover, Globalcom could purchase ISDN service for resale at a wholesale discount of approximately 22%, thereby eliminating any "price squeeze" concern in a particular scenario.

alternative special access arrangements based upon information that Globalcom gave Ameritech Illinois about Globalcom's network requirements. (Globalcom Ex. 1.0, p. 9; Eric Wince Ex. 1.1; Am. Ill. Ex. 1.0, pp. 5-6). Globalcom has taken advantage of cost effective service alternatives and pricing options identified by Ameritech Illinois, resulting in substantial savings to Globalcom in special access costs. (Am. Ill. Ex. 1.0, p. 7).

There is absolutely no evidence to support the assertion that Globalcom was "repeatedly put off by the account team representatives, when asked by Globalcom for 'lower priced products.'" Mr. Wince discussed one email dated March 13, 2000 in which Mr. Turner, a member of Globalcom's account management team, described non-price advantages (provisioning time, reliability, etc.) of Ameritech Illinois' special access services in comparison to a lower priced alternative available to Globalcom from another competitive provider of special access services. (Globalcom Ex. 1.0; Eric Wince 1.2; Am. Ill. Ex. 1.0, p. 8). Mr. Wince asserted that, in the email, Mr. Turner indicated that Ameritech Illinois would be "introducing a product that could lower [Globalcom's] costs," but that Mr. Wince "never heard about this product again." (Globalcom Ex. 1.0, p. 10). What Mr. Turner actually stated in the email was that Ameritech Illinois was "pursuing pricing alternatives which promise to have a near term impact on our rate structure, particularly in areas like Chicago." (Wince Ex. 1.1; Am. Ill. Ex. 1.0, p. 8). Mr. Turner further stated that while he could predict when these initiatives "will be reflected in our rates," "we anticipate action within the next year." In fact, within a year after Mr. Turner's email, the Company did implement a "pricing alternative" with a "near term impact on [the Company's] rate structure." Specifically, in November of 2000, the Company implemented a new geographical price zone structure which resulted in lower prices to Globalcom at its primary

location. Globalcom benefited from this rate restructuring without having to take any action on its own. (Am. Ill. Ex. 1.0, p. 8).

Accordingly, there is no evidence to support Globalcom's allegation that it was "repeatedly put off by the account team representatives." Globalcom's real complaint is that Ameritech Illinois did not affirmatively offer to perform the work of combining loop and dedicated transport and unbundled network elements to create new EELs, to be priced at UNE rates, for Globalcom to use as a substitute for special access service. As previously discussed, however, Ameritech Illinois had no obligation to make such an offer. Furthermore, until December of 2001, Globalcom never even requested the Company to provide new EELs. This fact is hardly surprising since, as Globalcom has acknowledged, it voluntarily entered into interconnection agreements beginning in 1999 which placed the responsibility on Globalcom, not Ameritech Illinois, to create "new EELs." (Tr. 155-57, 165; Am. Ill. Ex. 1.0, p. 24). Globalcom has attested that the implementation of these agreements "is consistent with the public interest because it will promote facilities based local exchange competition and enhance Globalcom's ability to provide Illinois local telecommunications users with a facilities based competitive alternative for local telephone services." (Am. Cross Exs. 1 and 2). It is Globalcom's failure to address, or even acknowledge, these interconnection agreements, not Ameritech Illinois' alleged failure to provide a product to Globalcom that it never requested, that demonstrates a "lack of candor."

B. THERE IS NO EVIDENCE SUPPORTING GLOBALCOM'S NEWLY STATED "BELIEF" REGARDING THE JURISDICTIONAL NATURE OF ITS SPECIAL ACCESS CIRCUITS

As another alleged example of Ameritech Illinois' "lack of candor," Globalcom presents an extra record discussion of its alleged "attempt to move from FCC Tariff 2 to the ICC Tariff

No. 21." (Globalcom Init. Br., p. 14). Globalcom asserts that it "believes that many of its circuits ordered under Ameritech's FCC tariff should receive service under its ICC tariff because less than ten percent of the usage on those lines is interstate." (Globalcom Init. Br., p. 14). Globalcom, however, failed to present any testimony that it has such a "belief;" nor did it present any evidence that would support such a "belief." To the contrary, Mr. Wince expressly acknowledged that, when it ordered special access circuits from Ameritech Illinois, Globalcom "thought its customers' interstate usage would be in excess of ten percent." (Globalcom Ex. 5.0, p. 8).

As Ameritech Illinois witness Mindell testified, Globalcom's own description of its network indicates that the special access circuits at issue carry significant amounts of interstate, as well as intrastate and local, traffic. (Am. Ill. Ex. 5.0, pp. 3-9). Mr. Wince's testimony, for example, indicates that Globalcom's special access circuits are used to carry a significant amount of ISP-bound traffic. (Globalcom Ex. 1.0, pp. 4-5, 19). As this Commission has recognized, the FCC has ruled that ISP bound calls are interstate in nature and the FCC has exclusive jurisdiction over such calls. Essex Telcom, Inc. v. Galatin River Communications, LLC, Docket 01-0427, p. 8 (July 24, 2002); In the Matter of Intercarrier Compensation for ISP Bound Traffic, Docket 98-68, Order on Remand and Report and Order, FCC 01-131, 16 FCC Rcd. 9151 (rel. April 27, 2001). Mr. Mindell concluded that "Globalcom's testimony, combined with what I know of switching, trunking and access services, supports the contention that the circuits are properly tagged as interstate in nature." (Am. Ill. Ex. 5.0, p. 4). Mr. Mindell's conclusion was unrebutted.[7]

[7] In his Reply Verified Statement, Globalcom witness expressly declined to respond to Mr. Mindell's testimony, asserting only that the "legal and policy analysis" would be addressed "on brief." Globalcom's brief is devoid of any analysis, either factual, legal or policy, which would support its "belief" that the special access circuits ordered out of Ameritech Illinois' FCC tariff carry less than ten percent interstate traffic.

C. GLOBALCOM'S ALLEGATIONS REGARDING THE CHARGES APPLICABLE TO A CONVERSION OF SPECIAL ACCESS CIRCUITS FROM FCC TARIFF NO. 2 TO FCC TARIFF NO. 21 ARE UNSUPPORTED BY THE RECORD

Globalcom also states that its "Complaint alleged that Ameritech was improperly assessing an administrative charge on each converted circuit." (Globalcom Init. Br., p. 14). While it is true that Globalcom's Complaint made such an allegation, Globalcom failed to present any evidence whatsoever to support its allegation that the administrative charge is "excessive" or otherwise improper. Globalcom has the burden of proof in this proceeding and, therefore, its allegations regarding administrative facilities assignment must be disregarded.

Globalcom (Init. Br., p. 14) goes on to allege that Ameritech Illinois' Answer to Globalcom's Complaint "added an entirely new wrinkle when it indicated that Ameritech would charge Globalcom an early termination charge" if Globalcom were to terminate service under the FCC Tariff No. 2 and order the same service under ICC Tariff No. 21. Globalcom asserts that this was a "complete reversal in Ameritech's position." (Id.). This assertion is false. In its Answer (¶ 14), Ameritech Illinois expressly denied that it ever "indicated that it would not charge Globalcom a termination penalty for circuits converted from the FCC special access tariffs to the ICC special access tariffs." As Ameritech Illinois explained, the termination liability provision of FCC Tariff No. 2 applicable to the pricing plans under which Globalcom has ordered special access circuits does not contain an exception for the early termination of service resulting from a customer's respecification of the percent of interstate use over such circuits. (Id., p. 6). Ameritech Illinois' Answer is supported by the testimony of Mr. Gimenez. (Am. Ill. Ex. 8.0).

Globalcom (Init. Br., p. 14) asserts that in a conversation with Mr. Wince, "Ameritech Illinois' account representative" indicated "that there would be no termination fees for the move

of these circuits." Globalcom is apparently referring to Mr. Wince's testimony regarding a call that he allegedly had with Mr. Gimenez on May 23, 2002. (Globalcom Ex. 5.0, p. 12). Mr. Gimenez, however, denied having told Mr. Wince that termination fees would be inapplicable in the situation described by Mr. Wince. (Am. Ill. Ex. 8.0). In judging the veracity of Globalcom's story on this issue, it is noteworthy that the allegation that Ameritech Illinois informed Globalcom that "it would not charge Globalcom a termination penalty for circuits converted from the FCC special access tariff to the ICC special access tariff" was first made by Globalcom in the initial Verified Complaint (¶ 14), filed on May 16, 2002. This was one week before the phone call on May 23, 2002, supposedly relied upon by Globalcom in support of its allegation.

VI. THE ALJ PROPERLY DISMISSED GLOBALCOM'S CLAIMS RELATED TO THE TERMINATION LIABILITY PROVISIONS OF THE INTERSTATE SPECIAL ACCESS TARIFF

The ALJ properly dismissed Globalcom's claims related to the termination liability provisions of Ameritech Illinois' interstate special access tariff, FCC No. 2. In support of this decision, the ruling correctly concluded that Ameritech Illinois' enforcement of the termination liability provision of FCC Tariff No. 2 is "not in derogation of federal law and FCC regulations, and the Commission has no authority to direct Ameritech Illinois' to depart from the terms of federal tariffs." Globalcom takes exception to this ruling, arguing that the Commission has "jurisdiction to determine the applicability of termination penalties for telecommunications services purchased from federal tariffs." (Globalcom Init. Br., p. 33). Globalcom argues that the Commission should exercise this alleged jurisdiction and order Ameritech Illinois to "waive" the termination charges set forth in FCC Tariff No. 2 for the conversion of special access circuits to UNE combinations. (Id., p. 2).[8] Globalcom's jurisdictional argument is without merit.

[8] Globalcom asserts that the Commission Staff has recommended that the Commission order Ameritech Illinois to waive its termination fees on the conversion special access circuits to UNE combinations. In fact, the

A. THE COMMISSION HAS NO JURISDICTION TO RESOLVE DISPUTES OVER TERMS, CONDITIONS, AND RATES FOR INTERSTATE SERVICE

It is undisputed that the termination liability provision at issue is a term and condition of the provision of tariffed interstate special access service. Both Illinois courts and the Commission have uniformly recognized that the Commission has no authority to regulate interstate rates and services. As the Illinois Appellate Court has ruled:

> [T]he Federal Communications Act of 1934 has given the Federal Communications Commission (FCC) exclusive authority to regulate interstate and international communication . . . this exclusive authority extends to interstate and foreign commerce in wire and radio communications and plenary jurisdiction over charge for such communications.

Illinois Telephone Corp. v. Commerce Commission, 260 Ill.App.3d 919, 922 (1st Dist. 1994) (citing 47 USC ¶¶ 151, 152(a) (1982); United States v. Western Electric Company, Inc., 531 F.Supp. 894, 903 (1981)). Similarly, the Commission has ruled that it is "compelled to follow" the "demarcation between interstate and intrastate jurisdiction," and that it may not exercise authority over interstate matters. Order, Metrocom, Inc., Ill.C.C. Docket 00-0234, p. 11 (Sept. 20, 2000).

In Illinois Telephone Corp., supra, the Illinois Appellate Court affirmed a Commission decision to dismiss a complaint against AT&T regarding the validity of certain international toll charges. The court held that "since the Commission has no authority to resolve disputes over international tariffs, the Commission correctly held that it did not have jurisdiction to adjudicate ITC's billing dispute with AT&T." 260 Ill.App.3d at 923. This holding is directly applicable to

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Commission Staff has made no such a recommendation. Staff's witness, Dr. Zolnierek, made his own recommendation with respect to termination charges based "solely on policy concerns." (Staff Ex. 1.0, p. 31). Dr. Zolnierek, however, indicated that the question of whether "Ameritech has the right to impose termination liabilities for the services Globalcom seeks to convert from special access services to combinations of unbundled network elements will turn on, in part, the legality and enforceability of contractual and tariff provisions." (Id.). Dr. Zolnierek further asserted that "Staff will discuss these issues in briefs." (Id.). These issues, however, are discussed nowhere in Staff's Initial Brief. Moreover, Staff's Brief does not challenge the ALJ's decision to dismiss those portions of Globalcom's Complaint related to the termination of liability provisions of FCC Tariff No. 2.

Globalcom's complaint regarding termination charges. At bottom, this case involves a dispute over whether Ameritech Illinois may properly bill Globalcom the early termination charges authorized under Ameritech Illinois' FCC special access tariff in a situation where service is terminated by Globalcom prior to the expiration of its term commitment for the purpose of converting service to a UNE combination. Consistent with the holding in Illinois Telephone Corp., the Commission "has no authority to resolve disputes over" interstate tariffs and, therefore, the Commission does "not have jurisdiction to adjudicate" Globalcom's "billing dispute" with Ameritech Illinois.

Contrary to Globalcom's assertion (Init. Br., p. 47), this conclusion is supported, not undermined, by the Illinois Supreme Court's decision in Kellerman v. MCI Telecommunications Corporation, 112 Ill.2d 428 (1986). That case involved a class action suit by subscribers of MCI's long distance telephone service alleging that certain advertisements, which described defendant's service charges, violated the Illinois Consumer Fraud and Deceptive Practices Act and the Illinois Uniform Deceptive Trade Practices Act. Id. at 434. In holding that the plaintiff's actions were not preempted by the federal Communications Act, the Court emphasized that the "subject matter of plaintiff's complaint involves neither the quality of defendant's service nor the reasonableness and lawfulness of its rates;" rather, "[p]laintiffs only alleged that defendant disseminated fraudulent and deceptive advertisements concerning the cost of its long distance telephone service." The court noted, however, that "State attempts to regulate interstate carriers' charges or services, would be preempted by the Act." 112 Ill.2d at 442 (emphasis added). The Court held that state law remedies "which do not interfere with the federal government's authority over interstate telephone charges or services and which do not otherwise conflict with an express provision of the Act," are not preempted by the Communications Act.

Unlike the plaintiff in Kellerman, Globalcom is asking the Commission to "interfere" directly with the FCC's authority over charges for interstate special access services. Thus, Kellerman makes it clear that the Commission does not have jurisdiction to entertain Globalcom's complaint.

The conclusion that the FCC retains exclusive jurisdiction to regulate charges for interstate special access services is confirmed by the FCC's First Report and Order implementing the local competition provisions of the Telecommunications Act of 1996.[9] In the First Report and Order, the FCC discussed the relationship between exchange access services[10] and unbundled network elements:

> When interexchange carriers purchase unbundled network elements from incumbents, they are no purchasing exchange access "services." They are purchasing a different product, and that product is the right to exclusive access or use of an entire element. Along this same line of reasoning, we reject the argument that our conclusion would place the administration of interstate access charges under the authority of the states. When states set prices for unbundled elements, they will be setting prices for a different product than "interstate exchange access services." First Report and Order, ¶ 358 (emphasis added).

Accordingly, there is absolutely no basis for Globalcom's assertion that the Illinois Commerce Commission has any jurisdiction over the "administration of interstate access charges," including termination charges included in a tariff governing special access services.

This conclusion is further supported by the Commission's recent decision in Essex Telecom , Inc. v. Galatin River Communications, LLC, Docket 01-0427 (July 24, 2002). That case involved a dispute over intercarrier compensation for ISP bound calls. Noting that ISP bound calls constitute interstate traffic over which the FCC has "exclusive jurisdiction" under Section 201 of the Communications Act, the Commission concluded that it is "without authority

[9] In The Matter Of Implementation Of The Local Competition Provisions In The Telecommunications Act Of 1996, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325 (Aug. 8, 1996).

[10] Special access services are a form of exchange access services. First Report and Order, ¶ 873; Supplemental Order Clarification, ¶ 10.

to determine disputes over compensation for ISP bound calls." Order, Docket 01-0427 at p. 8. Accordingly, the Commission concluded that the complainant "should address any concerns over the manner in which Galatin intends to charge it for costs associated with ISP bound calls to the FCC and the Commission declines to reach a decision relating to its proposed imposition of access charges in this context." Id. Similarly, Globalcom's concerns regarding the charges Ameritech Illinois may assess for the early termination of interstate special access service are properly directed to the FCC.[11]

B. GLOBALCOM'S POSITION IS UNSUPPORTED BY SECTION 251(d)(3) OF THE 1996 ACT

Globalcom argues that the Commission has jurisdiction to regulate termination charges applicable to interstate special access services pursuant to Section 251(d)(3) of the 1996 Act. That section provides as follows:

> In prescribing and enforcing regulations to implement the requirements of this section the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a state commission that (a) establishes access and interconnection obligations with local exchange carriers; (b) is consistent with the requirements of this [FCC]; and (c) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 USC § 251(d)(3). Citing the Eighth Circuit Court of Appeals' 1997 decision in Iowa Utilities Board v. Federal Communications Commission, 120 F.3d 753 (8th Cir. 1997) ("IUB I"), Globalcom asserts that "state commission orders do not have to be consistent with all of the FCC's regulations promulgated under Section 251." (Globalcom Init. Br., p. 35).

[11] The decisions of the Illinois courts and this Commission discussed above are in full accord with the innumerable federal court decisions. See, e.g., Ivy Broadcasting v. Ameritech Telephone & Telegraph Company, 391 F.2d 486, 491 (2nd Circuit 1968) (holding that "questions concerning duties, charges and liabilities of telegraph and telephone companies with respect to interstate communication services are to be governed solely by federal law and that the states are precluded from acting in this area"; MCI Telecommunications Corp. v. Graham, 7 F.3d 477 (6th Circuit 1993) ("tariffs filed with the FCC conclusively and exclusively control the rights and liabilities between a carrier and its customer"); AT&T Communications of the Mountain States, Inc. v. Public Service Commission, 625 F.Supp. 1204, 1208 (D.Wyo. 1985) (interstate telecommunications service is "within the exclusive jurisdiction of the FCC").

Globalcom's complaint, however, relates to the applicability of a rate (termination charge) for the provision of interstate special access service over which the FCC has exclusive jurisdiction under Section 201 of the Communications Act. 47 USC § 201. Section 251(i) of the 1996 Act provides that nothing in Section 251 "shall be construed to limit or otherwise affect the [FCC's] authority under Section 201." 47 USC § 251(i); First Report and Order, ¶ 358 ("Our authority to regulate interstate access charges remains unchanged by the 1996 Act"). As previously discussed, in accordance with Section 251(i), the FCC has "reject[ed] the argument" that Section 251 "place[s] the administration of interstate access charges under the authority of the states." First Report and Order, ¶ 358. Accordingly, there is nothing in Section 251(d)(3) or IUB I that supports Globalcom's assertion that the Commission may (i) issue orders that are "inconsistent" with the terms and conditions of tariffs governing the provision of interstate special access service under the exclusive jurisdiction of the FCC or (ii) ignore FCC decisions which bear upon a proper interpretation and application of those tariffs. (Globalcom Init. Br., pp. 35-36).

Furthermore, Globalcom's assertion that "state commissions are not precluded from the enforcement of any state regulation, order or policy by any FCC regulation prescribed or enforced under Section 251" ignores the United States Supreme Court's decision in AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999), which reversed that part of the Eighth Circuit's opinion pertaining to jurisdiction.[12] The Supreme Court rejected the Eighth Circuit's view that the FCC's rulemaking authority under Section 201(b) is "limited to those provisions dealing with purely interstate and foreign matters," and held that "Section 201(b) explicitly gives the FCC jurisdiction adopt to rules governing matters to which the 1996 Act applies," including, inter alia, a methodology for the pricing of UNEs. 525 U.S. at 378-80. In reaching this holding, the

[12] See Iowa Utilities Board v. FCC, 219 F.3d 744, 748 (2000) ("IUB III").

Supreme Court made it clear that states may not adopt rules and policies which are inconsistent with rules and policies adopted by the FCC "governing matters to which the 1996 Act applies":

> [T]he question in this case is not whether Federal government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the State commissions' participation in the administration of the new Federal regime is to be guided by federal agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a Federal program administered by 50 independent State agencies is surpassing strange.

525 U.S. at 378, n. 6 (emphasis added). It is clear, therefore, that an interpretation of Section 251(d)(3) as permitting the states to adopt policies and rules governing access to UNEs which are inconsistent with the rules adopted by the FCC to implement the 1996 Act did not survive the Supreme Court's decision in IUB II.[13]

Globalcom's argument that Section 251(d)(3) empowers state commissions to adopt rules and policies related to access obligations which are inconsistent with the FCC's rules governing these same obligations is also contrary to the UNE Remand Order, in which the FCC reevaluated the unbundling obligations of Section 251 in light of the Supreme Court's decision in IUB II. Construing Section 251(d)(3) of the 1996 Act in light of the Supreme Court's decision, the FCC stated: "We believe that Section 251(d)(3) grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of Section 251 and the national policy framework instituted in this Order." UNE Remand Order, ¶ 154 (emphasis added). Accordingly, there is no basis for Globalcom's assertion that the Illinois Commerce Commission has authority under Section

[13] If it had, the Eighth Circuit's decision would, by logical extension, support the conclusion that each state commission has authority under Section 251(d)(3) to adopt rules for the pricing of unbundled network elements which are inconsistent with the FCC's rules adopting the TELRIC methodology. In Verizon Communications, Inc. v. FCC, 122 S.Ct. 1646 (May 13, 2002), however, the Supreme Court made it clear that IUB II held exactly the opposite: "In AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 384-385 (1999) . . . this Court upheld the FCC's jurisdiction to impose a new methodology on the States when setting rates . . . We reversed [the decision in IUB I] in upholding the FCC's jurisdiction to 'design a pricing methodology' to bind state ratemaking commissions." 122 S.Ct. at 1663-64 (emphasis added).

251(d)(3) of the 1996 Act to establish rules governing access to unbundled network elements (including rules relating to the conversion of special access circuits to UNEs) which are inconsistent with "national policy framework" governing access to UNEs. Included in the "national policy framework" is the FCC's determination that "[A]ny substitution of unbundled network elements for special access would require the requesting carrier to pay appropriate termination penalties under volume or term contracts." UNE Remand Order, ¶ 481, n. 985.

C. GLOBALCOM MISCONSTRUES THE FCC ORDERS THAT ADDRESS THE APPLICABILITY OF TERMINATION LIABILITY

Globalcom argues that the many FCC orders relied on by the ALJ as authorizing the imposition of termination charges on the conversion of special access circuits to UNEs do not preempt the Commission from ordering Ameritech Illinois to "waive" the application of those charges based on the "facts of this case." (Globalcom Init. Br., p. 44). Specifically, Globalcom characterizes the FCC's findings regarding the applicability of termination charges to special access to UNEs conversions as "lukewarm." However, the UNE Remand Order, which establishes the FCC's "national policy framework" governing the access obligations of ILECs, is anything but "lukewarm" regarding the applicability of termination charges: "[A]ny substitution of unbundled network elements for special access would require the requesting carrier to pay any appropriate termination penalties required under volume or term contracts." Nor is there anything "lukewarm" about the FCC's recent decision in Verizon/Worldcom, Inc. et al. Arbitration Decision, CC Docket No. 00-218, 00-249 and 00-251, Memorandum Opinion and Order, DA 02-1731 (rel. July 17, 2002), in which the FCC conclusively rejected a CLEC proposal to "override the termination penalties contained in Verizon's special access tariffs," stating: "AT&T voluntarily purchased special access plans pursuant to Verizon's filed tariff and took advantage of discount pricing plans that offered local rates in return for a longer term

commitment. We will not nullify these contractual arrangements that AT&T previously accepted." Id., ¶ 348.

Globalcom relies on the UNE Remand Order's reference to "appropriate" termination penalties for the proposition that the Commission has authority to determine whether the application of the tariff determination charges is "appropriate" in this case. Globalcom has misinterpreted the UNE Remand Order, as the FCC made clear in the Verizon/WorldCom, et. al Arbitration Decision. In that case, AT&T pointed to the same language of the UNE Remand Order relied upon by Globalcom to support an argument that "in this instance termination fees are, in fact, not appropriate because to maintain such fees would permit Verizon both to recoup the monopoly profits implicit in special access pricing, and to recover its costs under the TELRIC pricing scheme". Id.. ¶ 346. In rejecting that argument, the FCC stated, in part, that "because AT&T has not challenged the amount of the penalties, but merely their existence, the record does not permit us to determine whether the existing penalties are not 'appropriate' as, set forth in the UNE Remand Order." Id. ¶ 348 (emphasis added).

In this case, Globalcom has challenged Ameritech Illinois' right to assess termination charges upon the conversion of special access circuits to UNEs. Globalcom has not, however, questioned the reasonableness of the formula by which the termination charges are calculated or the reasonableness of the resulting amount of those charges. Accordingly, Globalcom has presented no evidence that the termination charges at issue in this case are not "appropriate" as that term was used in the UNE Remand Order.

Furthermore, the evidence shows that the tariff formula for calculating special access charges, and the resulting amounts of those charges, are "appropriate." In this regard, the FCC has, notwithstanding Globalcom's assertion to the contrary (Init. Br., p. 4), "presented guidelines

regarding what it considers appropriate termination penalties." As Ms. Douglas testified, the FCC has determined that termination liability is appropriate if it does not exceed the "difference between (1) the amount the customer has already paid and (2) any additional charges that the customer would have paid for service if the customer had originally taken a shorter term arrangement corresponding to the term actually used." In The Matter Of Expanded Interconnection With Local Telephone Company Facilities, CC Docket No. 91-141, Second Memorandum Opinion and Order on Reconsideration, ¶ 40 (rel. September 2, 1993). The termination charges at issue in this case meet this criteria and, therefore, are "appropriate" under the guidelines established by the FCC. (Am. Ill. Ex. 3.0, pp. 17-18).

Globalcom also cites the Verizon Pennsylvania 271 Order for the proposition that the FCC has "invited challenges to the justness or reasonableness of termination penalties to be heard in the 'appropriate forum.'" (Globalcom Init. Br., p. 48). What the Verizon Pennsylvania 271 Order actually states is that "[t]o the extent that Verizon's tariff termination fees are not just and reasonable, the appropriate forum to challenge such fees is in the appropriate federal or state review of the specific tariff at issue." Verizon Pennsylvania 271 Order, CC Docket 01-138, Memorandum Opinion and Order, FCC 01-269 at ¶ 75 (rel. September 19, 2001). This language makes it clear that the "appropriate forum" in which to challenge the reasonableness of the termination liability provision of the "specific tariff at issue" here (FCC Tariff No. 2) would be the FCC, in a "federal review" of the tariff, not in an Illinois complaint proceeding.[14]

At pages 45-46 of its Initial Brief, Globalcom presents a laundry list of "facts" which it invites the Commission to consider in determining whether application of the termination

[14] Furthermore, the "appropriate forum" for challenging the reasonableness of the termination liability provision of Ill CC No. 21 would be a tariff review proceeding under Section 9-250 of the Act, not a Section 13-515 complaint proceeding. See, Rhythms Links, Inc. v. Illinois Bell Telephone Company, p. 13, Docket No. 99-0465 (December 2, 1999).

liability provision of FCC Tariff No. 2 is "appropriate" in this case. For the reasons fully discussed by the Company in its Motion to Dismiss, Response in Support of Motion to Dismiss and Initial Brief, however, all of the alleged "facts" have previously been considered and rejected by this Commission and/or the FCC as grounds for relieving CLECs of their obligation to pay tariffed termination charges when they convert special access services to UNE combinations prior to the expiration of their term commitments to purchase special access services.

For example, Globalcom's allegation that "Ameritech Illinois has a long history of refusing to provide new EEL service, thus forcing CLECs to purchase special access services" (Globalcom Init. Br., p. 46) is virtually identical to the argument made by AT&T in support of its position that it should be relieved of the obligation to pay termination charges in Verizon/WorldCom, et al. Arbitration Decision. As previously discussed, the Commission rejected AT&T's argument stating:

> AT&T voluntarily purchased special access services pursuant to Verizon's filed tariff and took advantage of discount pricing plans that offer lower rates in return for a longer term commitment. We will not nullify these contractual arrangements that AT&T previously accepted.

Verizon/WorldCom et. al. Arbitration Decision, ¶ 348.[15]

Globalcom's repeated assertion that there is "no termination of service" when a special access service is converted to a UNE combination (Globalcom Init. Br., p. 45) is also contrary to prior FCC decisions. The FCC explicitly recognized that "network elements are defined by facilities or their functionalities or capabilities, and thus, cannot be defined as specific services." In the First Report and Order (¶ 264), the FCC further stated that "when interexchange carriers purchase unbundled elements from incumbent LECs, they are not purchasing exchange access

[15] In Verizon/WorldCom et. al. Arbitration Decision, the FCC stated that AT&T's argument about whether a "conversion" qualifies as a "termination" was not appropriate for resolution in that arbitration proceeding. Id., ¶ 348. As discussed below, however, prior FCC decisions make it clear that a conversion of special access services to UNEs does constitute a termination of that "service."

'services.' They are purchasing a different product, and that product is the right to exclusive use of an entire element." First Report and Order, ¶ 358. Accordingly, when a CLEC converts special access services to a combination of unbundled network elements, such conversion constitutes, by definition, a termination of special access "service" and the substitution for that "service" of a "different product . . . the right to exclusive access or use of entire element[s]." First Report and Order, ¶ 358.

Consistent with the First Report and Order's distinction between "services" and "network elements," the FCC has rejected Globalcom's argument, that because a conversion of special access service to EELs is "a billing change and nothing more", it does not constitute a "termination of service" within the meaning of tariff provisions such as those included in FCC Tariff No. 2. In this regard, the FCC expressly recognized that a "conversion should not require the special access circuit to be disconnected and reconnected because only the billing information or other administrative information associated with the circuit will change when a conversion is requested." Supplemental Order Clarification, ¶ 30. Given this understanding of what is entailed by a special access to UNE "conversion," the FCC's admonishment that "any substitution of unbundled network elements for special access would require the requesting carrier to pay any appropriate termination penalties required under volume or term contract" (UNE Remand Order, ¶ 481, n. 985) would be meaningless unless the conversion of special access services to UNEs were understood to constitute a "termination" of such service.

Furthermore, as the Company discussed in its Initial Brief, this Commission has also concluded that the conversion of special access circuits to UNEs constitutes a "termination of service" for purposes of Ameritech Illinois special access service tariff. Level 3 Communications, Inc. ("Level 3"), Docket No. 00-0332 p. 24 (August 2000). In that case, Level

3 argued, as does Globalcom, that "since the carrier in question will continue to make use of the circuit provided as an EEL, there is no termination of service in the true sense of the word" and "conversion of special access to an EEL would involve nothing more than a billing change." Post Hearing Arbitration Brief of Level 3 Communications, LLC, pp. 63-64, Docket No. 00-0332 (July 31, 2000). (Am. Ill. Ex. 2.0, p. 32). The Commission rejected this argument, stating that "the FCC and various state Commissions have consistently held that the CLEC should remain responsible for termination fees." Order, Docket No. 00-0332, p. 24 (August 30, 2000). (Am. Ill. Ex. 2.0, p. 32).

It should be noted that Globalcom fails to even mention the Level 3 Order in its Initial Brief, much less attempt to identify any changed circumstances that would justify a departure from the Commission's decision in that case regarding termination charges. Furthermore, the language of the termination liability provisions of FCC Tariff No. 2 (and the identical provisions of Ill. CC Tariff No. 21) have not changed since the Commission issued its order in Level 3. Accordingly, there could be no "changed circumstances" that would support a change in the interpretation of that tariff language.

The conclusion that a conversion of special access service to UNEs prior to the expiration of an OPP term constitutes a "termination of service prior to the expiration date of the OPP term" is further compelled by at least two other considerations. First, as the Company explained in its Initial Brief (pp.22-23), the term "OPP" refers to Optional Pricing Plans under which Globalcom committed to the purchase of special access service under discounted special access rates for a specified period of time. The termination liability provision is intended to prevent a carrier, such as Globalcom, from taking advantage of the rate discount available for a particular OPP term commitment and then failing to honor that commitment. Thus if, Globalcom were to convert a

special access circuit to an EEL, which is priced at UNE rates, rather than the special access rates applicable to the service provided under an OPP plan, prior to the expiration of the OPP plan, it would, by definition, be terminating "service prior to the expiration date of the OPP term."

Second, the interconnection agreement between Globalcom and Ameritech Illinois states that "Requesting Carrier [Globalcom] must pay any applicable termination charge for the special access circuits that may terminated early in order to convert to UNEs" (emphasis added). (2001 Negotiated ICA Schedule 9.5, Section 2.0.3 ("Section 2.0.3")). (Am. Ill. Ex. 2.0, p. 27). If, as Globalcom now insists, the conversion of special access circuits to UNEs does not constitute a "termination of service prior to the expiration date of the OPP term" within the meaning of the termination liability provisions of FCC Tariff No. 2 and ICC Tariff No. 21 (which, as Globalcom witness Starkey acknowledges, are the only termination liability provisions pointed to by Section 2.0.3 of the ICA), the language of Section 2.0.3 would be rendered meaningless. It is not appropriate to "construe a substantial passage of a legal text as pointless." Metro East Center for Conditioning and Health v, Qwest Communications International, Inc., 294 F 3d. 924 (7th Cir., 2002).

D. GLOBALCOM'S ASSERTION THAT THE TERMINATION CHARGES ARE "ANTICOMPETITIVE" IS UNSUPPORTED BY THE RECORD

Globalcom argues that "in the present case, the evidence shows convincingly that Ameritech's termination fees are anticompetitive and precluding Globalcom from accessing UNE combinations" and that "the natural result of this situation is that competition here in Illinois is impaired, if not severely restricted." (Globalcom Init. Br., p. 36). As discussed, even if the Commission were to agree with Globalcom, it does not have jurisdiction to regulate the application of the termination charges included in FCC Tariff No. 2. Moreover, Globalcom's assertion is unsupported by any evidence.

Globalcom has argued that it would be "uneconomic" for it to convert all of the special access circuits which it has purchased under currently unexpired OPP term pricing commitments if termination charges apply. Presumably, Globalcom's assertions in this regard mean that the cost of continuing to purchase these special access circuits under the discounted rates associated with its OPP term commitments would be less than the costs associated with paying termination charges plus the UNE nonrecurring and recurring charges associated with converting the existing circuits to UNE combinations. However, this fact, if true, does not in any way prove that Ameritech Illinois' termination fees are "anti-competitive." To understand the fallacy of Globalcom's "analysis," it is important to understand that the termination charges at issue in this case do not represent a cost imposed upon Globalcom for the conversion of special access circuits to UNEs. Rather, the termination charges represent a "true up" mechanism to ensure that the amounts paid by Globalcom for special access service are billed at the appropriate rate based on the amount of time for which Globalcom actually took service under the special access tariff.

This point is illustrated by an example presented by Ms. Beata in her Direct Testimony. (Am. Ill. Ex. 1.0, p. 16). In December of 2000, Globalcom ordered several special access circuits with an OPP term of sixty months (five years), which expires on December 28, 2005. Globalcom, however, also had the option of ordering those circuits under a 12 month OPP plan. In its Complaint, Globalcom is requesting refunds of amounts paid for special access service based on the hypothetical assumption that it converted all of its circuits to EELs on December 27, 2001. (In fact, it requested the conversion of only five circuits). Assuming that the conversion of the 60 month OPP circuits had become effective on December 28, 2001, the termination charge billed to Globalcom under the special access tariff would have been calculated to equal the difference between the 60 month OPP rate and the 12 OPP rate multiplied

by the number of months (12) (from December 28, 2000 to December 28, 2001) during which Globalcom actually took special access service. As a result, the amount of special access charges paid by Globalcom, including the termination charge, would be no more than the total amount of recurring charges that Globalcom would have paid had signed up for the 12 month term rather than the 60 month term in the first place. (Am. Ill. Ex. 1.0, p. 16).

If Globalcom had signed up for the 12 month term paid the special access rates applicable to a 12 month term, and then converted its special access circuits to a combination of UNEs, upon the expiration of the 12 month term there would be no issue regarding termination charges in this case. In that situation, it is absolutely clear that there would be no basis for the Commission to order a refund of the special access charge paid for the 12 month term during which Globalcom took service. Having paid that charge for 12 months, and then converted its special access circuits to UNEs upon the expiration of the 12 month term without paying a termination charge, Globalcom would then pay the nonrecurring charge applicable to the conversion and would pay monthly recurring charges associate with the UNEs that comprise the combination on a going forward basis.

When Globalcom complains that, in this scenario, the application of a termination charge makes it uneconomical to convert a 60 month OPP special access circuit to a UNE combination after 12 months, all it really means is that the total cost of keeping its commitment to pay a discounted 60 month OPP term special access rate for five years is less than the total cost of paying a 12 month OPP term special access rate for one year and UNE rates for four years. Globalcom fails to explain why this is either unfair or "anticompetitive."

Globalcom also asserts that "as of the end of March 2002 [Ameritech Illinois] had converted only 464 of its 78,010 special access circuits." There is no evidence whatsoever,

however, to suggest that the relative number of special access lines that have "been converted to EELs" has anything to do with termination charges. The relative number of special access circuits that have been converted to combinations of UNEs may be attributed to a number of factors, most particularly the fact that, under the FCC's rules, a carrier may not substitute a combination of UNEs for special access services unless they provide a significant amount of local exchange service to a particular customer. Supplemental Order Clarification, ¶¶ 8-22. As Dr. Aron testified, there is no support for the presumption that application of the local use restrictions applied by the FCC and this Commission to determine whether a special access circuit qualifies conversion to a UNE combination "impairs" the ability of CLECs to compete. On the contrary, in determining that a CLEC must demonstrate that a substantial amount of local traffic is carried over special access circuits in order to request conversion of those circuits to UNEs, the FCC relied, in part, on a finding that there was insufficient evidence that a CLEC's ability to provide exchange access service, as opposed to local service, would be impaired by not having access to loops/transport combinations at TELRIC rates. Supplemental Order Clarification, ¶¶ 16-17.

In this regard, the fact that it may be more costly for a CLEC to provide services over special access circuits than via combinations of UNEs, does not in itself constitute an "impairment" of the CLEC's ability to compete. AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 390, n. 11 (1999). As Dr. Aron explained, from an economic perspective, firms with different cost structures and different cost levels can and routinely coexist and survive in real markets. (Am. Ill. Ex. 7.0, p. 13). In addition, the Supreme Court objected to the FCC's interpretation of the necessary and impair standard because the FCC considered only alternatives to a particular requested element that would be available from the incumbent itself. The Court

held that failing to consider whether there are alternative sources of the requested elements outside the incumbent's network, including self provision, is unacceptable. Id., 389, 400. To determine that a network element satisfies the necessary and impair standards, an evaluation must be made as to whether the element is available from an alternative source. As the DC Circuit of Appeals reiterated more recently,

> [C]osts comparisons of the sort made by the Commission, largely devoid of any interest in whether the cost characteristics of an "element" render it at all unsuitable for competitive supply, seem unlikely either to achieve the balance called for explicitly by Justice Breyer or implicitly by the court as a whole in its disparagement of the Commission's readiness to find "any" cost disparity reason enough to order unbundling . . . [T]o rely on cost disparities that are universal are between new entrants and incumbents in any industry is to invoke a concept too broad, even in support of the initial mandate, to be reasonably linked for the purpose of the Act's unbundling provisions.

United States Telecom Association et al. v. Federal Communications Commission et al., 2002 WL 1040574 (DC Circuit, May 24, 2002), § B.

In sum, there is no evidence to support Globalcom's assertion that the relative number of special access lines that have been converted to EELs constitutes a "problem" or that the "root of the problem" is "Ameritech's insistence on charging termination fees for conversion of special access to EELs."

E. STATE LAW DOES NOT REQUIRE THE WAIVER OF TERMINATION LIABILITY

Globalcom argues that "state law" requires the Commission to order Ameritech Illinois to "waive" application of determination charge provisions of the Company's interstate special access tariff. In support of this argument, Globalcom points to Section 13-801(a) and 13-801(g) of the Illinois Public Utilities Act. (Globalcom Init. Br., p. 37). Neither of these sections, nor any other provision of Section 13-801, however, address the issue of termination charges. Moreover, as previously discussed, the Commission has no jurisdiction to prohibit the application of a charge for interstate telecommunication services contained in an FCC tariff. For

this reason alone Section 13-801 should not be, and cannot be, interpreted as requiring the Commission to do so in this case. Northwest Airlines, Inc. v. Department of Revenue, 295 Ill.App.3d 889, 893 (1st Dist., 1998) (a statutory interpretation "which renders a statute unconstitutional or otherwise invalid should be discarded").

Globalcom's argument appears to be that, because termination charges allegedly restrict the ability of CLECs to convert special access circuits to combinations of UNEs, such charges are inconsistent with the requirement that Ameritech Illinois provide network elements "to the fullest extent possible to implement the maximum development of competitive telecommunications services offerings." 220 ILCS 5/13-801(a) (Globalcom Init. Br., p. 37). As illustrated by the example discussed in subsection (D), above, however, the fact that the termination charge might make it more economical for a CLEC to fulfill its special access OPP term commitment than to convert the service to a UNE combination, does not logically inhibit the "development of competitive telecommunications service offerings." On its face, the language of Section 13-801(a) does not prohibit Ameritech Illinois from enforcing the lawful provisions of an interstate special access tariff, including termination charges calculated to ensure that customers pay tariff rates consistent with the period of time for which the customer took special access service. The limiting phrase "to the fullest extent possible" is certainly broad enough to encompass factors such as a CLEC's obligation to pay lawful, tariffed rates for the special access services that it committed to buying when it entered into a term special access arrangement.

In any event, Globalcom's reliance on Section 13-801 is completely unfounded in light of Section 13-801(j), which indicates that "nothing in Section 13-801 "is intended to require or prohibit the substitution of switched or special access services by or with a combination of

network elements nor address the Illinois Commerce Commission's jurisdiction or authority in this area." 220 ILCS 5/13-801(j) (emphasis added). In light of 13-801(j), Section 13-801(a) cannot be construed as authorizing the Commission to order the removal of all alleged obstacles (including lawful, interstate and intrastate termination charges) to the substitution of combinations of UNEs for special access services.

Globalcom's reliance on Section 13-801(g), which provides that "network elements" shall be provided by the incumbent local exchange carrier to requesting telecommunication carriers at "cost based rates" (220 ILCS 5/13-801(g)) is similarly misplaced. Globalcom asserts that Section 13-801(g) requires "the ALJ or this Commission [to] reconsider its decision to allow Ameritech to access nonrecurring charges to access UNE combinations that are not cost based." (Globalcom Init. Br., p. 37). As Ameritech Illinois has repeatedly explained, however, the termination charges at issue in this case are not "nonrecurring charges to access UNE combinations." Rather, they are charges for the provision for special access service. Specifically, the termination charge represents a "true up" of the rates (both recurring and nonrecurring) for special access service actually purchased during the period prior to the early termination of the OPP term commitment. Thus, the termination charge reflects tariffed rates for special access services actually provided to the customer, not a "additional cost" to "access UNE combinations." (Globalcom Init. Br., p. 38).[16]

Globalcom's argument (Init. Br., pp. 37-38) that the Commission is "obligated" by Section 13-801 to adopt a policy respecting termination charges which is "inconsistent with the FCC" is also erroneous because it is completely ignores the General Assembly's declaration that Section 13-801 "provides additional state requirements contemplated, but not inconsistent with,

[16] For the reasons fully discussed in the Company's Initial Brief (pp. 55-60), although the special access rates and associate termination charges are not developed on the basis of the TELRIC methodology which applies solely to the pricing of UNEs, these special rates and termination charges are, nonetheless, cost-based.

Section 261(c) of the Federal Telecommunications Act of 1996, and not preempted by orders of the Federal Communications Commission." 220 ILCS 5/13-801(a). Section 261(c) of the 1996 Act provides that states may not adopt regulations which are "inconsistent with this part or the [FCC's] regulations to implement this part." 47 USC Section 261(c) (emphasis added). Thus, the General Assembly has made it clear that Section 13-801 does not impose requirements that are inconsistent with FCC rules and policies implementing the 1996 Act.

Accordingly, in the absence of any language in Section 13-801 expressly addressing the issue of termination charges, there is absolutely no basis for interpreting Section 13-801 as requiring (or even allowing) the Commission to disregard the numerous FCC orders which make it clear that a CLECs ability to request the conversion of an existing special access circuit to an existing combination of UNE loop and dedicated transport does not in any way relief the CLEC of its preexisting, separate legal duty to pay any applicable early termination charges under special access tariffs.

Finally, Globalcom's argument that the application of termination charges to the conversion of special access circuits to UNEs would violate Section 13-801(g) is directly contradicted by the rebuttal testimony of Globalcom witness Starkey: "My testimony does not try to convince the Commission that Ameritech cannot assess termination liabilities because the FCC's TELRIC rules (or other rules) somehow forbid it, the purpose of my testimony is to convince the Commission that Ameritech should not be allowed to assess termination liabilities because to do so represents bad public policy." (Globalcom Ex. 8.0, p. 11) (emphasis in original). This Commission does not have authority to either regulate charges applicable to the provision of interstate services within the exclusive jurisdiction of the FCC, or to substitute its judgment for that of the FCC regarding policies applicable to the provision of interstate service,

based on the Commission's own "public policy" preferences. In any event, for all the reasons previously discussed by the Company, a decision to relieve Globalcom of its contractual obligations by ordering Ameritech Illinois to "waive" application of the termination charges would be "bad public policy."

VII. GLOBALCOM'S REQUEST FOR DAMAGES SHOULD BE DENIED

In its brief, Globalcom requests that the Commission order Ameritech Illinois to refund to Globalcom alleged "overcharges" equal to the difference between special access rates and UNE rates" and offers three alternative calculations based upon different time periods. For the reasons fully discussed in Ameritech Illinois' Initial Brief, Globalcom's request for damages in any amount is unsupported and should be rejected. Furthermore, as the Company also discussed, to the extent that the Commission deems it appropriate to award damages in this case (and it should not), it should be limited to damages based on a calculation of overcharges for the period beginning December 27, 2001, the period used by Globalcom to calculate requests for damages included in its Amended Complaint.

The alternative calculations of overcharges offered by Globalcom (Init. Br., p. 50) assume that Globalcom converts all eligible circuits. Globalcom asserts that "it would take that action if the Commission determines that Globalcom should not have to pay early termination charges on term agreements for special access service." As Globalcom now acknowledges, however, its alternative calculations of damages are not appropriate if the "Commission decides to affirm the ALJ's decision to dismiss the portion of Globalcom's Complaint relating to termination charges for special access services obtained" through FCC Tariff No. 2. (Id.). In that event, Globalcom asserts that a "fourth calculation" should be made to calculate the

"difference between special access rates [Globalcom] paid on all month-to-month circuits since December 27, 2001 and the EELs rates for those circuits." (Globalcom Init. Br., p. 51).

Globalcom failed to provide this "fourth calculation" of alleged overcharges for the record and, therefore, Globalcom has failed to meet its burden of proof with respect to damages. Accordingly, even if the Commission concludes that Ameritech Illinois violated Section 13-514 by enforcing a collocation requirement of a tariff placed into effect with the express permission of the Commission (and it should not), there is no basis for awarding Globalcom damages in any amount. See Z-Tel Communications, Inc. v. Illinois Bell Telephone Company, 02-0160, p. 22 (May 8, 2002) (where Z-Tel failed to specify which part of requested compensatory damages of $500,000 were attributable to damaged reputation, Commission denied Z-Tel's damage request despite evidence suggesting harm to Z-Tel's reputation).

VIII. THE ARGUMENTS MADE BY STAFF ARE BEYOND THE SCOPE OF THIS PROCEEDING AND SHOULD BE DISREGARDED

The most remarkable aspect of Staff's Brief is its failure to address the allegations made by Globalcom in its Complaint. Rather, Staff has chosen to devote its entire brief to addressing an allegation that Globalcom did not make, i.e., that Ameritech Illinois violated state law by failing to include terms and conditions for conversion of special access circuits to UNEs in a state tariff prior to September of 2001.

This case involves a Complaint brought by Globalcom, and the only issue properly before the Commission is whether Globalcom has sustained its burden of proving the allegations of its Complaint. Globalcom did not allege, as Staff now argues, that Ameritech Illinois' alleged failure to file a tariff with terms and conditions for the conversion of special access circuits prior to September 18, 2001 violated Section 13-514. Moreover, before making such an allegation, Globalcom would have been required to "notif[y] [Ameritech Illinois] of the alleged violation

and offer[] [Ameritech Illinois] 48 hours to correct the situation." 220 ILCS 5/13-515(c). The notice of alleged violations submitted by Globalcom to Ameritech Illinois on March 14, 2002 did indicate that Ameritech Illinois was in violation of Section 13-514 for having failed to file a tariff related to the conversion of special access circuits to UNEs. This is not surprising, of course, since Ameritech Illinois had filed such a tariff nine months earlier on September 18, 2001. Accordingly, there was no "situation" to "correct" and no basis for filing a Complaint regarding the tariff issue at that time.

As indicated in Globalcom's Initial Brief, it is requesting relief related to its allegations that Ameritech Illinois violated state law by (i) not offering to do the work of combining unbundled loop and dedicated transport network elements to provide new EELs beginning in November of 1999; and (ii) not waiving the collocation requirement for new EELs contained in the Interim Compliance Tariff when Globalcom requested new EELs for the first time in December 2001. Globalcom, however, has also requested that the Commission order the Company to waive the application of tariffed termination charges on the conversion of special access circuits to UNE combinations. Globalcom has requested no relief with respect to an alleged failure to file a tariff for the conversion of special access circuits to UNEs prior to September 2001.

Accordingly, Staff's attempt to inject the issue in this proceeding ignores a fundamental principle of law: a Commission order cannot exceed the scope of the complaint it has before it. Alton & Southern Railroad et al. v. Illinois Commerce Commission ex rel. Perry Coal Company et al., 316 Ill. 625, 629-30 (1925) ("while the Commission should be liberal in construing the pleadings before it, the statute requires that the carrier shall be notified of the complaint which they are required to answer, and although no particular form is prescribed, there must be a

statement of the thing which is claimed to be wrong, sufficiently plain to put the carrier upon its defense"); Peoples Gas, Light & Coke Company v. Illinois Commerce Commission, 220 Ill.App.3d 1053, 1060 (1991) ("if the ICC were permitted to enter an order that is broader than the written complaint filed in the case, then it would be ruling on an issue of which the responding party had no notice and no opportunity to defend or address"). The Commission has previously relied on these cases to dismiss requests for relief, such as that made by Staff in its Initial Brief, that exceed the scope of the complaint it has before it:

> Because the complainants in this case did not ask that Ameritech PIC protection be tariffed, it would have been error for the Commission to go beyond the four corners of the complaint and grant such relief. The complainants never asked for the relief requested by the Attorney General; therefore the Commission was correct when it did not grant the relief requested by the Attorney General.

"Response Brief of the Illinois Commerce Commission in Illinois Bell Telephone Company v. Illinois Commerce Commission," before the Illinois Appellate Court for the First Judicial District, Fifth Division (Docket Nos. 1-96-2146 and 1-96-2166) (Consol.) (Jan. 16, 1997) (administrative notice requested).

Moreover, the relief requested by Staff is beyond the power of the Commission to grant in this proceeding. Staff asserts that the Commission can and should impose a penalty under Section 13-516(a)(2) upon Ameritech Illinois "for its failure to file tariffs setting forth the rates, terms and conditions for conversion of EELs to special access after November 24, 1999." (Staff Init. Br., p. 16). Section 13-516(a)(2), however, does not authorize the Commission to impose such a penalty. That section expressly states that "the period for which the penalty shall be levied shall commence on the day that the telecommunications carrier first violated Section 13-514 or on the day of the notice provided to the telecommunications carrier pursuant to subsection (c) of Section 13-515, whichever is later, and shall continue until the telecommunications carrier

is in compliance with the Commission order." 220 ILCS 5/13-516(a)(2) (emphasis added). As previously discussed, Ameritech Illinois has never been provided notice pursuant to subsection (c) of Section 13-515 that its alleged failure to "file tariffs setting forth the rates, terms and conditions for conversion of EELs to special access after November 24, 1999" violates Section 13-514 or any other provision of state law.

Furthermore, the alleged violation, if any (and Ameritech Illinois does not agree that there was a violation), was corrected on September 18, 2001, when Ameritech Illinois included terms and conditions for the conversion of special access circuits to EELs in its Interim Compliance Tariff. The terms and conditions related to the conversion of special access circuits to EELs are also included in the permanent compliance tariff filed by Ameritech Illinois pursuant to the Final Order in Docket 01-0614. (Am. Ill. Ex. 9.0). Accordingly, Ameritech Illinois has already complied with Staff's interpretation of state law and there is no period of time for which Ameritech Illinois can be subjected to penalties in accordance with the plain language of Section 13-516(a)(2). That section does not give the Commission authority to impose penalties for alleged violations of the law which occurred in the past and which were corrected before notice of an alleged violation was even received.

Although the Commission need not, and should not, address the tariff issue raised by Staff in its Brief, Ameritech Illinois is compelled to point out that it does not agree with Staff's legal analysis. As the Company discussed in its Motion to Dismiss (pp. 19-20), the requirement that Ameritech Illinois convert special access circuits to UNEs derives from federal law, specifically the 1996 Act, and the 1996 Act designates interconnection agreements, not tariffs, as the means for making UNEs available to CLECs. 47 USC § 252(a). Consistent with FCC Rule 315(b), Ameritech Illinois has always made existing UNE combinations available through its

interconnection agreements. MCI Telecommunications Corp. v. GTE Northwest, Inc., 41 F.Supp.2d 1157, 1177-78 (D.Oreg. 1999) (holding that a state commission's attempt to require an incumbent LEC to file a tariff defining the terms and prices for all network elements that the commission had determined should be unbundled "conflicts with the [1996] Act and is preempted"); Verizon North v. Strand, 140 F.Supp.2d 803, 809-10 (Western Dist. Mich. 2000), appeal pending (refusing to enforce state commission order that required an ILEC to file tariffs setting rates at which CLECs could purchase UNEs, holding that such a requirement improperly bypassed the Section 252 arbitration and negotiation process).

Ameritech Illinois also is compelled to correct a number of factual misrepresentations contained in Staff's brief. First, Staff asserts that "Globalcom was, and remains, prepared to certify that all of the traffic on certain of its special access circuits is intrastate." (Staff Init. Br., p. 8). In fact, there is absolutely nothing in the record to support that assertion. Staff cites the First Amended Verified Complaint, but fails to cite any evidence supporting the Complaint. As discussed above in response to Globalcom's Initial Brief, the unrebutted evidence shows that the interstate traffic carried over the special access circuits ordered by Globalcom under FCC Tariff No. 2 exceeds 10 percent, which is the threshold for making the circuits subject to the interstate jurisdiction of the FCC. (Globalcom Ex. 5.0, p. 8; Am. Ill. Ex. 5.0, p. 6). In the Matter of MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 4 FCC Rcd. 5660 (1989). Accordingly, there is absolutely no basis for Staff's suggestion that all of the traffic carried by Globalcom on its special access circuits "originates and terminates in Illinois." (Staff Init. Br., p. 8). Second, Staff asserts that because of the absence of an Illinois tariff for the conversion of special access prior to September 12, 2001, "Ameritech has failed to offer the combinations of UNEs that constitute an EEL at

TELRIC rates." (Staff Init. Br., p. 9). This assertion is unsupported. The undisputed evidence shows that Ameritech Illinois fully complied with the requirements of the UNE Remand Order, Supplemental Order, and Supplemental Order Clarification by immediately taking steps to make special access to UNE conversions available to CLECs when those requirements became effective on February 17, 2000. The undisputed evidence shows that the Company posted guidelines and instructions for CLECs to follow in ordering conversions and offered contract amendments governing such conversions. (Am. Ill. Init. Br., pp. 39-41).

Staff asserts that the Company's alleged "failure to file a tariff clearly resulted in harm to CLECs." Again, this assertion is unsupported by any evidence. There was no evidence presented regarding the effect that the absence of a tariff had on CLECs. Speculation as to how the alleged failure to file a tariff may have affected CLECs other than Globalcom is beyond the scope of this proceeding. Staff admits that it has no "opinion" on how "Ameritech's failure to comply with its obligation to offer EEL conversions . . . through a proper state tariff affected Globalcom." In fact, Globalcom presented no testimony alleging that the absence of a state tariff affected its ability to convert special access to certain circuits to UNEs in any respect. Although Globalcom proffered various reasons for why it "would have been discouraged from converting its special access circuits to EELs" (Globalcom Ex. 5.0, pp. 2-3), the absence of a state tariff was not one of those reasons.

Fourth, Staff asserts that "it is not clear whether Ameritech has in the past offered to provide preexisting EELs in cases where carriers are not collocated." (Staff Init. Br., p. 12). Again, Staff is attempting to create an issue that should not exist. Ameritech Illinois posted guidelines and instructions for CLECs to follow in ordering special access to UNE conversions beginning in March 2000, within days after the requirements of the UNE Remand Order and

Supplemental Order became effective. (Am. Ill. Ex. 2.0, pp. 7-8). Those guidelines and instructions were updated a year later. (Id., pp. 6-7). Both the original and updated guidelines made it clear that "collocation is not required" for the FCC's third local use test. (Am. Ill. Ex. 2.0, Sch. DFN-1, p. 2; Sch. DFN-2, p. 5) (emphasis in original).

Furthermore, the interconnection agreement between Ameritech Illinois and Focal Communications, which became effective in 2000 and was adopted by Globalcom in 2001, includes terms and conditions for the conversion of special access circuits to UNEs which encompass the three local use tests adopted by the FCC in its Supplemental Order. (See Appendix C to Ameritech Illinois' Motion to Dismiss). That contract language indicates that collocation is required for only two of the three local use tests. Staff participated in the case in which this contract language was originally arbitrated (Docket 00-0027), and presented testimony (by Mr. Garvey, served on March 1, 2000) that discussed, and largely supported, Ameritech Illinois' proposal regarding special access conversions.[17]

Finally, Staff asserts that "Globalcom brought the instant complaint, in part, because it believed that it could not convert EELs because of an Ameritech imposed collocation restriction on such conversions." (Staff Init. Br., p. 14). Staff asserts that "a tariff clearly specifying Ameritech's preexisting EELs offering – that Ameritech was required to file – could have remedied this confusion." (Id.). Once again, Staff has missed the boat. As Mr. Wince testified, Globalcom's confusion did not result from the lack of a tariff. Rather, Globalcom's confusion resulted from a misreading of the Interim Compliance Tariff, which did include terms and

[17] Contrary to Staff's assertion (p. 12), the Draft I2A did not state that conversions of existing configurations of loop/transport network elements would be allowed only if the CLEC were collocated. Moreover, the Draft I2A was a draft proposal submitted as an exhibit in Docket 00-0700. It is the effective interconnection agreements (such as the Focal agreement adopted by Globalcom) and the conversion guidelines posted on Ameritech Illinois' CLEC website, not the Draft I2A, that CLECs would have looked to, and continue to look to, to understand the rules for converting special access circuits to UNEs.

conditions for special access to EEL conversions. (Globalcom Ex. 1.0, pp. 19-20; Tr. 190-91). It is apparent that Globalcom confused the terms and conditions of the Interim Compliance Tariff applicable to new EELs with the separate terms and conditions applicable to special access to EEL conversions. (Tr. 190). If Globalcom had more carefully read the tariff, its contract, and the posted guidelines, or sought clarification from Ameritech Illinois, there would have been no confusion.

In any event, Globalcom has made it clear that, as far as it is concerned, there no longer is any issue in this case with respect to whether there was ever a collocation requirement for the conversion of special access circuits to EELs. (Tr. 613). Staff's attempts to resurrect the issue should be disregarded.

IX. CONCLUSION

For all the reasons discussed herein and in Ameritech Illinois' Initial Brief, Globalcom's Amended Complaint should be denied.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

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CERTIFICATE OF SERVICE

I, Karl B. Anderson, an attorney, certify that a copy of the foregoing **REPLY BRIEF OF AMERITECH ILLINOIS** was served on the parties on the attached service list by U.S. Mail and electronic transmission on August 16, 2002.

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